

ESTTA Tracking number: **ESTTA810242**Filing date: **03/29/2017**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Image Ten, Inc.
Granted to Date of previous extension	03/29/2017
Address	216 Euclid Avenue Glassport, PA 15045 UNITED STATES
Attorney information	Farah P. Bhatti Buchalter, a Professional Corporation 18400 Von Karman Ave., Suite 800 Irvine, CA 92612 UNITED STATES mmeeks@buchalter.com, fbhatti@buchalter.com, trademark@buchalter.com Phone:949.224.6272

Applicant Information

Application No	87090468	Publication date	11/29/2016
Opposition Filing Date	03/29/2017	Opposition Period Ends	03/29/2017
Applicant	Lemorande, Rusty Ralph 1245 N. Crescent Hts. Blvd #B, b LOS ANGELES, CA 90046 UNITED STATES		

Goods/Services Affected by Opposition

Class 041. First Use: 0 First Use In Commerce: 0
All goods and services in the class are opposed, namely: Motion picture film production

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
Dilution by blurring	Trademark Act Sections 2 and 43(c)

Mark Cited by Opposer as Basis for Opposition

U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	NIGHT OF THE LIVING DEAD		
Goods/Services	Motion picture film production, video games, software apps, promotional goods related to the motion picture including action figures, ac-		

	cessories, collectibles, books, photographs, posters, artwork, illustrations, printed materials and a variety of other goods and services.
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Attachments	NOTICE OF OPPOSITION - NIGHT OF THE LIVING DEAD.pdf(97216 bytes)
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Signature	/fbhatti/
Name	Farah P. Bhatti
Date	03/29/2017

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Image Ten, Inc. <div style="text-align: center;">Opposer,</div> <div style="text-align: center;">v.</div> Rusty Ralph Lemorande <div style="text-align: center;">Applicant</div>	Opposition No.: _____ Serial No.: 87/090468 Mark: NIGHT OF THE LIVING DEAD
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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Application No.: 87/090468
 Mark: NIGHT OF THE LIVING DEAD
 Applicant: Rusty Ralph Lemorande
 Filed: June 30, 2016
 Published: November 29, 2016
 Services: Motion picture film production.

NOTICE OF OPPOSITION

Image Ten, Inc., a Pennsylvania corporation, having its offices at 216 Euclid Avenue, Glassport, Pennsylvania 15045 (“Opposer”), believes it will be damaged by registration of the mark NIGHT OF THE LIVING DEAD covered by U.S. Application No. 85/425859 filed by Rusty Ralph Lemorande (hereinafter “Applicant’s Mark”).

The grounds for this Opposition are as follows:

1. Opposer was the original production company that produced the NIGHT OF THE LIVING DEAD film. Opposer’s ownership includes the original filmmakers, writers and producer for the NIGHT OF THE LIVING DEAD film including but not limited to John Russo,

George Romero, and Russ Streiner. In connection with its business, Opposer has used the trademark NIGHT OF THE LIVING DEAD for over 49 years, since 1968.

2. Opposer has used the NIGHT OF THE LIVING DEAD mark (“Opposer’s Mark”) for, *inter alia*, motion picture film production, video games, software apps, promotional goods related to the motion picture including action figures, accessories, collectibles, books, photographs, posters, artwork, illustrations, printed materials and a variety of other goods and services (“Opposer’s Goods and Services”). Since the film’s release, Opposer, including some of its shareholders, regularly appear at NIGHT OF THE LIVING DEAD Conventions where fans and others who appear in the film come together and Opposer, along with the shareholders, market the Opposer’s Goods and Services.

3. Opposer began promoting its goods and services under the NIGHT OF THE LIVING DEAD mark in 1968 and has continuously used the mark in interstate commerce since that time. On information and belief, Opposer’s first use of the NIGHT OF THE LIVING DEAD mark pre-dates Applicant’s first use (if any) of Applicant’s Mark.

4. In addition to Opposer’s own advertising efforts, the NIGHT OF THE LIVING DEAD mark receives significant unsolicited media coverage regarding the film and activities and merchandise regarding the same, such as appearances at fan conventions and the like. Further, the NIGHT OF THE LIVING DEAD mark is seen and heard in movies, books, and TV shows, and such media coverage reaches tens of thousands of consumers annually.

5. Opposer is currently in the process of obtaining an assignment of Registration No. 3686876 from SphereWerx, LLC. Such registration was originally registered for the benefit of Opposer and thus, the Registration will be assigned in the near future.

6. Opposer's Marks are recognized, known and associated with Opposer's Goods and Services. Moreover, Opposer's Mark is being used in advertising and promoting Opposer's Goods and Services in the relevant industries.

7. Since its initial adoption of Opposer's Mark, Opposer has made a substantial investment in advertising and marketing its goods and services under Opposer's Mark. Opposer's movie, NIGHT OF THE LIVING DEAD, is a well-known film with a large following of viewers and fans, and is extremely well known in pop culture. Opposer has used, advertised, promoted and offered for sale Opposer's Goods and Services under Opposer's Mark. As a result of Opposer's use and promotion of Opposer's Mark, Opposer's mark is well-known and famous.

8. By virtue of the use and promotion of the NIGHT OF THE LIVING DEAD mark for over 49 years, the extensive use of the NIGHT OF THE LIVING DEAD mark and the sale and promotion of goods and services under the NIGHT OF THE LIVING DEAD mark, NIGHT OF THE LIVING DEAD has come to be recognized as identifying products and services finding their original exclusively in or otherwise associated with Opposer, is distinctive of Opposer's goods and services, and has come to represent enormous goodwill of Opposer.

9. Image Ten's exclusive and extensive use of the NIGHT OF THE LIVING DEAD mark and the unsolicited media coverage concerning Opposer and referencing the NIGHT OF THE LIVING DEAD mark, have made the NIGHT OF THE LIVING DEAD mark famous and distinctive.

10. On information and belief, on June 30, 2016, Applicant filed Application Serial No. 87/090468 for the mark NIGHT OF THE LIVING DEAD under Section 1(b) for the following services: motion picture film production. The application was published for

opposition in the *Official Gazette* on November 29, 2016. Opposer filed an Extension of Time to Oppose which was granted until March 29, 2017. Therefore, this Opposition is being timely filed.

11. The Applicant's application was filed under Section 1(b) of the Trademark Act and hence, on the Opposer's information and belief, Applicant does not have prior rights in the NIGHT OF THE LIVING DEAD mark.

12. On information and belief, Opposer believes that Applicant has not used the mark at all in connection with any goods or services. Even if Applicant has used the mark, any use would be subsequent to that of Opposer and any such use would be an infringement of Opposer's rights, which date back to 1968.

13. Applicant's mark is identical and/or substantially similar to Opposer's Mark and therefore, when and if used in connection with the services set forth in the Applicant's application, it is *inter alia*, likely to cause confusion, or to cause mistake, or to deceive purchasers and potential purchasers within the meaning of 15 U.S.C. §1052(d).

14. Applicant's Mark is confusingly similar to Opposer's Mark as it is identical. The overall commercial impression conveyed by Applicant's Mark is identical to Opposer's Mark.

15. The services in Applicant's Mark are identical to Opposer's services with which Opposer uses the Opposer's Mark. Applicant's use and registration of Applicant's Mark in connection with such services is likely to cause confusion, deception and/or mistake among the relevant public.

16. The channels of distribution employed by Opposer and Applicant are identical, and the classes of customers sold to by Opposer and Applicant are identical. Therefore, purchasers of Applicant's services are likely to believe or be confused or deceived into thinking that Applicant's services also originate with or are in some way associated with, sponsored by or authorized by Opposer, and registration of Applicant's Mark is likely to cause confusion or mistake or to deceive, all to the injury of Opposer.

17. Applicant's use and registration of Applicant's Mark is likely to falsely suggest a connection with Opposer and Opposer's Mark.

18. Applicant's use and registration of Applicant's Mark interferes with Opposer's Mark and will damage Opposer, its business and its goodwill.

WHEREFORE, Opposer requests that registration sought by Applicant be denied and that this Opposition be sustained.

Please charge Deposit Account No. 500977 to cover the opposition fee and any additional fees which may be required, or credit any overpayment to this account.

Dated: March 29, 2017

Respectfully Submitted,

/fbhatti/
Farah P. Bhatti
Michael Meeks
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CERTIFICATE OF SERVICE

Opposer, Image Ten, Inc., hereby certifies that a copy of this NOTICE OF OPPOSITION has been served upon Applicant on this 29th day of March, 2017, by First Class U.S. Mail, postage prepaid, at the following address:

Rusty Ralph Lemorande
1245 N. Crescent Hts, Blvd. #b, B
Los Angeles, California 90046

/fbhatti/

Attorney for Opposer